

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF VIRGINIA
 CHARLOTTESVILLE DIVISION

ELIZABETH SINES, et al.,

No. 3:17-cv-72

Plaintiffs,

Charlottesville, Virginia

vs.

November 9, 2018

2:32 p.m.

JASON KESSLER, et al.,

Defendants.

TRANSCRIPT OF TELEPHONIC MOTION HEARING
 BEFORE THE HONORABLE JOEL C. HOPPE
 UNITED STATES MAGISTRATE JUDGE.

APPEARANCES:

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Proceedings recorded by FTR; computer-assisted transcription.

1 (Call to Order of the Court at 2:32 p.m.)

2 THE COURT: All right. Good afternoon. This is Joel
3 Hoppe. Who is on the line for the plaintiffs?

4 MS. KAPLAN: Hi, Judge. It is Robbie Kaplan. I'm here
5 with a bunch of colleagues. Would you like me to introduce them?

6 THE COURT: Ms. Kaplan, are you going to be speaking for
7 your clients?

8 MS. KAPLAN: I'm not, Your Honor. My partner, Gabrielle
9 Tenzer, will be speaking on the imaging issue. And to the extent
10 the consent issue comes up, my colleague at Cooley will be speaking
11 to that.

12 THE COURT: Okay. All right. Well, why don't --

13 MS. KAPLAN: I'm just the MC in a way, Your Honor.

14 THE COURT: Sure. Sure. How about if we will just
15 identify the folks who are going to be participating and speaking
16 at this hearing today. And I'll remind everyone to -- before you
17 speak, to please identify yourself as well so that we can keep
18 track of who is talking.

19 MS. TENZER: Hi, Your Honor. It is Gabrielle Tenzer, at
20 Kaplan Hecker and Fink, on behalf of the plaintiff on the imaging
21 motion, ECF 354.

22 MR. BOWMAN: Good afternoon, Your Honor. Philip Bowman
23 from the Cooley firm. And I'll address the Discord consent issue,
24 to the extent the Court wants to hear about that.

25 THE COURT: Okay. All right. And then how about for the

1 defendants? And let me do this by counsel. I think that may be
2 the best way to do it.

3 Mr. Woodard or Mr. Kolenich, are you on the phone?

4 MR. KOLENICH: Yes, sir. This is Jim Kolenich.

5 THE COURT: Okay.

6 All right. And, Mr. Kolenich, who -- remind me who you
7 are here on behalf of.

8 MR. KOLENICH: Mr. Kessler and a host of other
9 defendants. We do have a motion to withdraw pending on two of
10 them, but that's yet to be granted.

11 THE COURT: Okay. All right. I think I have that list
12 here.

13 All right. How about mister -- for Mr. Spencer?
14 Mr. DiNucci, are you on the phone?

15 MR. DiNUCCI: I am, Your Honor.

16 THE COURT: All right. And then, Mr. Jones, are you on
17 the phone?

18 MR. JONES: Yes. I'm here.

19 THE COURT: All right. Let's see. And then -- who else
20 do we have for the defendants?

21 MR. CAMPBELL: Your Honor, this is David Campbell for
22 -- on behalf of James Fields. Good afternoon, Your Honor.

23 THE COURT: All right.

24 MR. CAMPBELL: Hopefully I'm playing a very small role
25 here. But I just wanted to make sure I was available in case it

1 came up.

2 THE COURT: Okay. Thank you. I -- from the plaintiffs'
3 motion, I imagine that you are. It doesn't seem like they are
4 pursuing anything from mister -- related to Mr. Fields in this
5 motion.

6 All right. Anyone else --

7 MS. TENZER: That's correct, Your Honor.

8 THE COURT: -- for any other defendants? Okay.

9 All right. Well, counsel, thank you for calling in.
10 This is a motion related -- or a motion to compel the defendants to
11 submit to the ESI protocol. And this hearing is being recorded by
12 the Court's FTR system. So just one more reminder to identify
13 yourself before you -- before you speak.

14 Counsel, I have reviewed everything that has been
15 submitted on this motion, and -- but I'm happy to hear from
16 Ms. Tenzer, if you want to start us off and tell me anything else
17 that you have to say about the motion.

18 MS. TENZER: Thank you, Your Honor.

19 We've discussed this issue several times already, so I
20 will try to keep it as brief as possible. And hopefully -- now
21 that plaintiffs have agreed to front the costs of this exercise,
22 which we set forth in our reply papers, which for many of the
23 defendants was really their sort of sole opposition to the ESI and
24 preservation protocols, we're hopeful that with your help today we
25 can get this process finally agreed to and started.

1 You know, we think the proposal we have made is very
2 straightforward. It is in the stipulation that we submitted to the
3 court. Defendants would provide us with a list of the devices and
4 social media accounts that they used to communicate and create
5 documents concerning the events that are at issue in this
6 litigation. We would identify those that we thought needed to be
7 imaged. There would be a third-party vendor who would conduct that
8 imaging. That data would go to the defendants. They would get to
9 review it for privilege and responsiveness. They could use search
10 terms and date ranges to limit that review. And then that -- the
11 results of that exercise would be turned over to us.

12 And, again, as we said, we would be willing to pay for
13 that up front. We're not conceding that the defendants have met
14 their obligation in terms of making their showing for the cost
15 shifting, but we are prepared to move forward at this time and
16 allow them to try to make that showing while the imaging is
17 proceeding.

18 THE COURT: Do you have a proposed vendor --

19 MS. TENZER: We have been speaking with a number -- we
20 have -- thank you, Your Honor. We have been speaking with several
21 vendors. We have a couple that we have been speaking with in a
22 fair amount of detail who are both willing and able to take up this
23 project and are willing to do it at reduced rates, if not partially
24 on a pro bono basis. And, therefore, the costs of the imaging
25 would be significantly lower than the estimate of \$5,000, a device

1 that was put forward by the defendants.

2 So there are vendors available. And we are talking to
3 them. So that -- so, yes.

4 You know, we -- we're hopeful that we can move forward.
5 We still have nine defendants of the 18 who haven't produced any
6 documents. And the productions we have gotten are deficient both
7 substantively and in terms of their form. And we're concerned
8 about preservation efforts.

9 Obviously, we're trying to get the best deal possible
10 from the vendor. And we're available to answer any other questions
11 that you might have about that.

12 THE COURT: One objection that I saw that the defendants
13 have raised is, you know, why isn't this a reciprocal obligation?
14 Why aren't the plaintiffs submitting to this protocol as well? Do
15 you want to address that?

16 MS. TENZER: Sure, Your Honor.

17 We -- we have already actually done the protocol. We are
18 not asking defendants to do anything that we haven't already done
19 on behalf of the plaintiff. All of the plaintiffs' devices were
20 imaged many, many, many months ago. And we have been reviewing,
21 producing that ESI in the format that we are asking defendants to
22 produce their ESI when we produce it to them.

23 So it is reciprocal. We're perfectly happy to make the
24 stipulation or whatever the Court enters reciprocal. But we have
25 already satisfied what we have proposed and asked -- and are asking

1 the Court to order the defendants to do.

2 THE COURT: Okay.

3 All right. Well, is there anything else before I hear
4 from the defendants? I will give you an opportunity to respond to
5 what they have to say as well.

6 MS. TENZER: I don't think so, Your Honor. Thank you.

7 THE COURT: Okay.

8 All right. Then, Mr. Kolenich.

9 MR. KOLENICH: Thank you, Your Honor.

10 Their presentation that they are going to front the costs
11 and then potentially stick us with a bill later doesn't really
12 fairly meet our objections in the pleadings. But, that said, if it
13 is acceptable to the Court that they use their own equipment and
14 conduct their own ESI and then they produce it to us, we can do
15 that. We can access -- you know, we can acquire our own equipment
16 far, far cheaper than what these companies charge, professional
17 grade equipment, the same stuff that the companies use, and produce
18 our ESI back to them. If that's acceptable procedure, then we're
19 willing to do that. And, you know, we can order that stuff next
20 week. I imagine I'll have it by the end of the week and we can
21 commence examining my clients' devices, just as they claim they
22 have examined their clients' devices.

23 THE COURT: Well, why haven't you done that at this
24 point?

25 MR. KOLENICH: Well, when I went through this in separate

1 litigation, the other side objected. They wanted a third party.
2 They insisted that we use a third-party company.

3 Secondarily, up until recently, working with other
4 attorneys around -- you know, colleagues, I wasn't aware that I
5 could get it any cheaper than many tens of thousands of dollars.
6 But it turns out that we can. So that's relatively new information
7 to me. That's why I say if it is acceptable to the Court, we will
8 acquire the equipment and engage in the data acquisition and
9 process.

10 THE COURT: Well, you know, I guess one concern I would
11 have with that is, you know, these discovery requests were issued
12 in January; now it is November. And it is a significant delay. It
13 seems like we need to figure out a way to make sure that all of the
14 relevant information is being produced in a timely manner. And,
15 you know, setting up -- I want to do this once. I don't want to go
16 through, you know, a couple different, you know, steps to gather
17 and produce electronic discovery. So I'm concerned that if you-all
18 just do this in-house that that may perpetuate the delay and the
19 concerns that have led to this motion being filed to begin with.
20 You know, it is typical that this is done using a third-party
21 vendor.

22 MR. KOLENICH: Well, without getting too far into why
23 that is typical and arguing about it, we're happy to, you know, go
24 with a third-party vendor. We are not -- you know, we want to make
25 plain to the Court, we cannot pay these vendors' fees. You know,

1 they are saying, "Well, we'll front the fees. We're going to
2 negotiate some third-party reductions, you know, with the third-
3 party vendors." That's great. But when they decide -- or, you
4 know, they want to come back and say we should have to pay them
5 now, we can't make a showing, if they are saying -- they don't have
6 the money. I want to be very up front with that.

7 We can afford to buy some equipment. That is a sunk
8 cost. Counsel might even participate in that cost. But under no
9 circumstances can they pay the bills that I have seen even on a
10 reduced basis with other ESI vendors. These bills are
11 astronomical. And these -- my clients cannot afford them. Even
12 cut in half, they can't afford them.

13 THE COURT: And, you know, at this point --

14 MS. TENZER: Your Honor --

15 THE COURT: Hold on just a second.

16 It is hard for me to really assess that, not knowing more
17 information about why this is so burdensome or your clients
18 individual -- I understand there's going to be a cost. But then,
19 also, we don't know the amount at this point. But perhaps --

20 MR. KOLENICH: I can only go what amounts have been
21 -- you know, Mr. Kessler went through this in separate litigation.
22 And the bill was 17 or \$18,000 for a phone. So, you know, these
23 guys can't pay that. They cannot do it. Now, the equipment can be
24 purchased cheaper than that, the necessary equipment.

25 Now, I understand the Court's concern that you don't want

1 to have us do it in-house and it has to come back for another
2 round. So I see the benefit of going with a third-party vendor
3 here and getting this moving as quickly as possible. Certainly the
4 third-party vendors will work faster than what staff I have in our
5 first attempt at this. So I'm all right with that. I just want to
6 be up front that my guys cannot pay, that we are not making any
7 representation or agreement to their proposal that "We're going to
8 front the costs and come back and bill you later" if, you know, if
9 they feel like -- or whatever the standard use is. They are saying
10 we haven't made a showing, I think --

11 THE COURT: Well, I think it will be -- at that time it
12 will be -- you know, if they do -- I mean, typically, the producing
13 party pays for the production of the discovery. You know, that can
14 be shifted if a certain showing is made. And, you know, I think it
15 makes a lot of sense. If this protocol is followed and the
16 plaintiffs pay for it up front, we're going to have a bill. We're
17 going to know what the amount is. And we're not going to be
18 talking about, you know, hypotheticals or maybe, you know, someone
19 can pay a certain indeterminate amount. They are going to be -- it
20 is going to be more concrete at that point.

21 And, you know, if the plaintiffs ask for you-all to pay
22 for this production, then -- you know, I think it will be -- well,
23 it will be a more concrete process to evaluate that issue at that
24 time, after this has been done. And it is not going to delay the
25 production of any relevant evidence any further.

1 Ms. Tenzer, were you --

2 MR. KOLENICH: All right. As long as we're on the same
3 page that we're not -- you know, we're not acquiescing on that cost
4 issue or making any representation that these guys have an ability
5 to pay anywhere near what the usual bill is from these third-party
6 vendors.

7 THE COURT: I understand that.

8 Ms. Tenzer, were you trying to make a point about that?

9 MS. TENZER: Your Honor, yes. Thank you.

10 We agree -- we feel very strongly that this should be
11 done by a third-party vendor. We're perfectly happy to submit the
12 two best proposals that we have received, you know, for the Court's
13 consideration. And, you know, we'll just reiterate that, you know,
14 we're taking the financial risk here. They are bringing up the
15 issues of cost and what they can afford. And I think, you know, we
16 agree with Your Honor, once we get this going and we have some
17 concrete numbers, you know, we can deal with that. But we really
18 do need to get it going.

19 THE COURT: Okay.

20 Mr. Kolenich, anything else that you wanted to say on
21 behalf of any of your clients at this point?

22 MR. KOLENICH: No, Your Honor, as long as their proposal
23 is followed by the vendor, that we get it for vetting. You know,
24 the vendors can assist us in getting rid of nonresponsive or
25 frivolous information. And that's really the most important thing.

1 Other than that, we're fully ready to cooperate.

2 I do want to mention -- and I think the plaintiffs are
3 aware -- that there's sort of a separate issue with the separate
4 -- one of my defendants, Traditionalist Workers Party, had a
5 completely in-house computer system, hence controlled by one
6 individual defendant, Mr. Parrott. And that has been sort of a
7 side issue as to where that machine is and what has been done to
8 preserve information on that machine. But he's going to be fully
9 cooperative. But that's just sort of a -- we don't know the status
10 of that, once these third-party vendors get it, because he built
11 the machine himself, I guess. I just want to put that on the
12 record. He's sort of a separate issue.

13 We're going to cooperate as long as -- you know, as long
14 as the billing issue is dealt with, then we're prepared to
15 cooperate.

16 THE COURT: Okay. Well, you know, the protocol, as I
17 understand, would require you-all, on behalf of Mr. Parrott, to
18 identify any devices that are -- might contain or are likely to
19 contain responsive information and to submit those. Is that
20 something that he's going to be able to do?

21 MR. KOLENICH: (Inaudible) to the best of my knowledge,
22 he's prepared to do that; yes, sir.

23 THE COURT: Okay. All right.

24 Mr. DiNucci?

25 MR. DiNUCCI: Yes, Your Honor.

1 I share in Mr. Kolenich's concerns about costs. I also
2 -- my biggest concern -- and, actually, Your Honor, I have
3 attempted to find a third-party vendor down here. So far, with the
4 exception of some recent developments, have been striking out. I
5 have been told by various third-party vendors down here that they
6 are conflicted out. I suspect they do a lot of work down here for
7 Cooley.

8 I also have kind of gotten a sense, in talking to people
9 on the phone or making attempts to get people to call me back, they
10 know a little bit about this case and don't want to deal with
11 people like me. I don't know why. I'm a nice guy.

12 I have, however -- today I was actually on the phone with
13 a vendor down here, a small potatoes guy, but a guy that is very
14 professional. I'm -- he is actually going to be sending me a
15 proposed contract to conduct the kind of examination that we're
16 talking about here, to be done -- he's not an employee of mine.
17 He's an independent contractor. He is local, which is important to
18 me. I don't want to be dealing with somebody in LA, Chicago, or
19 New York, because there's going to be a fair amount of time, I
20 suspect, that has to go into this on the part of defense counsel to
21 coordinate with these vendors. But I'm lining somebody up. I
22 don't have a problem -- I need to have the thing reviewed myself.

23 And I'm sitting on Mr. Spencer's devices, so to speak. I
24 have got them in my office. They are not out getting thrown in the
25 drink, so to speak.

1 THE COURT: Yeah. You know, I think the location of the
2 vendor is probably not all that significant. I know there are
3 shops that do this from Washington state for cases here in
4 Virginia, for, you know, multiple parties in cases. And they are
5 able to, you know, set up electronic databases to review documents
6 and things like that. You know, you are going to do it at your
7 office. You are not traveling across the country to do that.

8 MR. DiNUCCI: I'm just talking about time difference, as
9 far as I would be on the phone with people. It is just
10 logistically it is simpler if it is somebody, for example, in the
11 DC metropolitan area for me. And that's where I have been looking.

12 I also have some concerns about details in the order.
13 But I'll stick to the big picture, unless Your Honor wants me to
14 address, you know, some of the nuances of the order.

15 THE COURT: Well, I'm happy for you to do that, because,
16 you know, I've looked at the order and I've looked at your letter
17 raising some concerns about parts of the order. If you still have
18 some remaining concerns, you know, I think we need to flesh that
19 out here. I mean, that's part of the purpose of the hearing.

20 MR. DiNUCCI: Well, if I could, then, let me address some
21 of them. I'll try to do it in summary fashion. And I guess
22 preliminarily I need to say I don't know the first thing about IT
23 stuff. But in looking at some of the definitions, looking at page
24 2-4 of the proposed order, roman numeral number one, "General
25 Provisions and Definitions," I see at least on the face of that

1 some variation between those general provisions and definitions
2 and, for example, in the definition of instructions set forth in
3 the requests for production of documents. It seems to me what we
4 ought to do is rely on what definitions and instructions were in
5 the requests for production of documents. They set forth in great
6 detail the manner in which they wanted information produced and the
7 electronic format. Now there seems to be some variation in this
8 order compared to what was in the instructions and definitions.

9 And also to the extent that they define such terms as
10 "document" on page three of the draft order, they go on about
11 -- they use various terms. It seems to me we ought to just go
12 -- we ought to default to the federal rules and use whatever
13 definitions there may be in Rule 34 or elsewhere that is
14 appropriate so we don't have conflicting sources of authority here
15 as to what it is we're supposed to be doing.

16 Also --

17 THE COURT: Let me address that real -- you know, real
18 quickly, because, you know, ultimately it is -- as I understand it,
19 you know, the definitions would apply to this order, but I don't
20 think that it is -- at the end of the day, when you are tasked with
21 turning over documents responsive to the discovery requests that
22 have been propounded to you, this order doesn't change the scope of
23 those requests, as I -- as I understand. And this --

24 MR. DiNUCCI: I don't think the request is being changed,
25 Your Honor, but, again, to the extent that in the instructions

1 -- in the requests for production they said they wanted electronic
2 information formatted a certain way, if what they are saying -- and
3 it seems my quick and dirty sense is they are saying in these
4 definitions in the proposed order the format they want the stuff
5 produced at is somewhat different from what they were saying in the
6 instructions. Which should prevail in the event of conflict, I
7 guess is the question?

8 THE COURT: Well, let me ask. Ms. Tenzer, do you think
9 that there is some conflict in the format of the production from
10 what you-all have requested and what this order represents?

11 MS. TENZER: (Inaudible), Your Honor. And, obviously,
12 whatever is in the order would dictate. So I don't know that
13 there's any fundamental difference. And whatever is agreed upon
14 and ordered by the Court would be what was -- what would -- we
15 would expect to be followed. And since nobody has followed the
16 instructions in the format that we provided in the first instance,
17 I'm not sure that it makes that much of a difference.

18 THE COURT: All right. Mr. DiNucci, I know that your
19 client has provided some documents at this point. But, you know,
20 those are in a format that doesn't allow metadata and some other
21 things that I think pretty customarily are sought and required in
22 discovery. So I -- you know, I think that, you know, those
23 documents would certainly need to be produced in a different format
24 that complies with what the request is -- with the request, but
25 also, you know, with this proposed order.

1 MR. DiNUCCI: Well, I understand that, Your Honor. I'm
2 not even addressing what -- the issue of whether they should get
3 metadata or not. I'm just talking about the technical demands that
4 are set forth in the requests for production and the technical
5 demands set fourth in this proposed order. And there may well be
6 -- and my gut as an old man tells me there is variance between the
7 two sets of instructions. And I just -- you know, what are we
8 telling a vendor predominates -- or prevails? I presume, as
9 Ms. Tenzer said, it would be the language in the order. But it is
10 a legitimate issue to raise. I see differences between the
11 language.

12 But a broader issue too, Judge, on page seven of the
13 proposed order, at six, which is captioned "Identification of
14 Responsive Documents," it says in the last two lines, "Defendant
15 shall review the results of the collection and produce to plaintiff
16 those nonprivileged documents that are responsive to the discovery
17 request," etc., etc., etc. It makes no reference to what happens
18 -- to whether documents can be withheld on the basis of objections
19 that the defendant has previously asserted in their responses to
20 requests for production.

21 It seems to me we need to include some language saying
22 you have -- you know, you can still stand on the objections you
23 raised before. And there's a similar requirement, from my
24 perspective, elsewhere in the order.

25 It ought to be clear that if the parties had previously

1 said that -- made some other objection, they should be able to
2 stand on that and not withhold, if you will, just privileged
3 documents. They haven't waived them. If they stated objections,
4 they stated objections, and they ought to be able to stand on them.

5 THE COURT: All right. Are those --

6 MS. TENZER: Your Honor?

7 THE COURT: Yes. Go ahead. Ms. Tenzer.

8 MS. TENZER: This is Gabrielle Tenzer.

9 I was just going to say in many instances the defendants
10 haven't specified in their responses and objections on which
11 objections they are withholding documents. You know, if they knew
12 that, then, obviously, they can stand on those objections. And at
13 some point eventually we may get to actual motions to compel on
14 individual requests. But we're not at that point yet because of
15 where we are with the ESI protocol.

16 THE COURT: And I -- Mr. DiNucci, are we talking about
17 objections that you have already asserted or are you anticipating
18 that you are going to have new objections after you have seen these
19 documents?

20 MR. DiNUCCI: Well, I'm certainly referring to any
21 objections that Mr. Spencer previously stated, because he was the
22 one who responded to the requests for production. With respect to
23 whether there may be additional objections, I have to be candid,
24 there may be. I don't know what the universe of documents that
25 there is, assuming there's any additional documents beyond what he

1 produced. But, I mean, I have got a duty to Mr. Spencer,
2 obviously, consistent with the federal rules. If I see other
3 documents, well, wait a second, those shouldn't be produced, I -- I
4 -- I think I'm duty-bound to assert objections to that. Now, Your
5 Honor may say they are too late, but I certainly have to, unless I
6 want to commit malpractice, reserve the right to state objections
7 if there's other materials out there.

8 And I would ask Ms. Tenzer -- if I have to say on what
9 -- on the basis of what objection something is withheld, I suppose
10 it boils down to, too, you know, giving some indication what is
11 being withheld in some fashion that wouldn't disclose the
12 information subject to the objections. That way the issue could be
13 pressed by opposing counsel and Your Honor could decide it.

14 THE COURT: All right.

15 All right.

16 MR. DiNUCCI: (Inaudible) with litigation --

17 MS. TENZER: Your Honor --

18 MR. DiNUCCI: -- I don't know what is out there until I
19 see it.

20 THE COURT: Right.

21 All right, Ms. Tenzer.

22 MS. TENZER: Your Honor, all -- the defendants served
23 their responses and objections months ago. We have had
24 back-and-forth letter writing. And we have gone through deficiency
25 letters and all of that. And our position would be, under the

1 rules, any objections that they have not already raised -- and
2 there are no -- have been waived. We're nine months in. We're
3 more than nine months in since we served these document requests.
4 We're not going to -- I don't think there's any grounds on which
5 they can start asserting new objections.

6 THE COURT: Yeah.

7 Mr. DiNucci, my thought on that would be that, you know,
8 if you receive some documents that are privileged or something like
9 that, then certainly, you know, you can create a log and withhold
10 those. But to assert, you know, new objections, it does seem like
11 the time has long since passed to do that.

12 And really, you know, the objections have been lodged.
13 You-all have been discussing those over the past couple of months.
14 And I think that those objections really should be largely, you
15 know, resolved probably by the time this -- you know this
16 electronic information is provided to you. And if there are some
17 lingering disputes, then, you know, we need to go ahead and get
18 those addressed.

19 MR. DiNUCCI: I understand that. As I said, I don't know
20 what I'm going to be -- assuming arguendo there's additional
21 information that is responsive, I don't know what it is until I see
22 it. So I don't know how to handle it. And I can't say that I
23 wouldn't object. I may get shot down really quickly by Your Honor,
24 but, I mean, I have got to do what I have got to do. Hopefully
25 there's not a whole lot we're even talking about. There's kind of

1 a presumption, this whole exercise, if there's thousands of pages
2 out there, I suspect (inaudible) and this whole discussion may
3 become moot.

4 THE COURT: All right.

5 MR. DiNUCCI: Also, another broader point -- and maybe it
6 is just me missing the big picture, which is not an unusual
7 phenomenon, I suppose -- to what extent is any third-party vendor
8 going to be subject to the protective order in this case? I don't
9 recall seeing in this proposed order any such language. And I
10 certainly haven't seen a contract yet from a third-party vendor.

11 And I'm concerned -- because in going through these
12 devices, any third-party vendor, at least theoretically, could be
13 happening upon information that has absolutely nothing to do with
14 this case. And I'm concerned about confidentiality.

15 THE COURT: I think that's a --

16 MS. TENZER: Your Honor, I --

17 THE COURT: Go ahead, Ms. Tenzer.

18 MS. TENZER: I was going to say I believe under the
19 protective order in the case the vendor would be required to sign
20 and be subject to the protective order, which is what we have done
21 with our vendors.

22 MR. DiNUCCI: But, see, that would be solved, then, to
23 put some similar language in any order that Judge Hoppe may be
24 signing, just so that it is real clear.

25 MS. TENZER: The order is already --

1 MR. DiNUCCI: I don't recall the terms of it at this
2 point. I don't have it in front of me. But that is a concern.
3 But if there's already language that is going to address that
4 issue, so be it.

5 THE COURT: Yeah, I'd have to review the protective
6 order. But I think that's -- you know, that's typically how -- you
7 know, how it is done.

8 MR. DiNUCCI: Another concern, Your Honor, this would be
9 at page 12 of the proposed order, paragraph 17, under roman numeral
10 five, which is "Miscellaneous," it says, "All obligations in the
11 stipulation and order are continuing obligations. As such, for
12 every new email address, mobile phone device, computer, external
13 storage, social media account, or other communications platform,"
14 etc., etc., etc., "defendants are going to have to provide an
15 updated certification confirming they have completed their
16 obligations under the stipulation and order." I read that to mean
17 -- maybe I haven't -- maybe I read it incorrectly -- that if my
18 client goes out and buys a new computer, we have got to submit that
19 to the third-party vendor. That seems kind of absurd, from my
20 standpoint, if what we're talking about is proof of a conspiracy
21 that supposedly was formed in 2017. It certainly would be onerous.
22 I presume any number of these defendants may periodically get new
23 computers, new phones. Are we going to have to have all of those
24 imaged?

25 THE COURT: Yeah, Ms. Tenzer --

1 MS. TENZER: Your Honor --

2 THE COURT: -- that is not what you are seeking?

3 MS. TENZER: It requires that we be informed. And it
4 would depend. I mean, based on what we raised in our email
5 yesterday, we're finding out every day that some of these
6 defendants are using email addresses and other, you know, accounts
7 that we're completely unaware of. And if they are using them to
8 communicate about the events that took place, then that needs to be
9 preserved accordingly. That's their obligation under the rules.

10 I'm not saying it has to be subjected to a third-party
11 vendor, but it has to be preserved appropriately. And we need to
12 be made aware of accounts and devices that are being used to
13 communicate about the case.

14 THE COURT: And so you would -- you would want a
15 supplement of Exhibit A to identify additional devices and what
16 responsive documents may be on the device?

17 MS. TENZER: Exactly.

18 THE COURT: All right.

19 So, Mr. DiNucci, you know, if there's additional
20 responsive information on a new device or a new account, plaintiffs
21 are asserting, you know, that that's something that would fall
22 within your duty to supplement.

23 MR. DiNUCCI: I understand what they are saying, but I --

24 THE COURT: Why wouldn't it?

25 MR. DiNUCCI: Well, I understand, Your Honor. I mean,

1 the simplest thing is for each defendant to keep using the same
2 computer. But, again, that's a concern of mine. If somebody buys
3 a new computer, do we keep adding to this list? And even if the
4 person -- it's used for business purposes and not in any way,
5 shape, or form relates to anything but a business purpose they may
6 be engaging in, my concern is we're going to be told, "Hey, we want
7 to have that device searched," and it just goes on forever.

8 THE COURT: But, you know, part of the certification in
9 Exhibit A is identify the device, the type, and then what the
10 nature of responsive documents is. You know, if your client
11 obtains, you know, a desktop or something that doesn't have
12 anything to do with this case and there's no discussion of it,
13 there are no responsive documents on it, then I would think that
14 your certification would indicate as much. And if there are any
15 questions that come up, you-all can talk about that. But I -- you
16 know, I don't know that that would be subject to review by the
17 third-party vendor.

18 MR. DiNUCCI: And one other point on this. Any such
19 obligation I presume is going to be reciprocal here. I mean, some
20 of the plaintiffs here are like my kids. They don't talk to one
21 another face-to-face. Everything they use are thumbs-on devices.
22 I don't know if they are still talking about this case. But they
23 have -- the plaintiffs themselves ought to be subject to that
24 requirement as well.

25 THE COURT: Yeah. Well, every litigant in this case is

1 subject to the ongoing duty to supplement.

2 MR. DiNUCCI: But I'm talking concerns as well, Your
3 Honor, Exhibit A.

4 THE COURT: Well, do you, Mr. DiNucci -- Ms. Tenzer
5 indicated that her clients have already essentially followed what
6 is laid out in this protocol and that that is why they haven't made
7 it reciprocal; that, you know, they are not opposed to making it
8 reciprocal. Do you --

9 MR. DiNUCCI: Well, I take counselor's word always. I
10 don't necessarily take the plaintiffs themselves at their words
11 that they have turned in all of their devices to their counsel. I
12 think the defendants should get a certification from the plaintiffs
13 that they have done that. I mean, our clients are going to be
14 required to certify --

15 MS. TENZER: That's fine, Your Honor.

16 MR. DiNUCCI: -- all devices, then that obligation should
17 be incumbent upon the plaintiffs themselves as well.

18 THE COURT: All right. So, Ms. Tenzer, one thing that
19 you are to address, the reciprocal -- or the concerns about this
20 being reciprocal, you can add to the stipulation that the
21 plaintiffs would be bound by it as well and that they would -- they
22 would supplement under Exhibit -- under Exhibit A also.

23 MS. TENZER: Of course, Your Honor.

24 THE COURT: All right.

25 All right. Mr. DiNucci, do you have any other concerns?

1 MR. DiNUCCI: Those are the major points, Judge.

2 THE COURT: Okay.

3 All right. Mr. Jones.

4 MR. JONES: Yes, Your Honor.

5 THE COURT: Anything that you would like to say?

6 MR. JONES: I don't -- I don't believe I have anything to
7 add, other -- in addition to what Mr. Kolenich and DiNucci have
8 already said.

9 THE COURT: Okay.

10 All right. And, Mr. Campbell, you are kind of taking a
11 sideline view today?

12 MR. CAMPBELL: Yes, sir. Nothing to add.

13 THE COURT: All right. All right.

14 UNIDENTIFIED VOICE: (Inaudible) anything else?

15 MS. TENZER: Your Honor.

16 THE COURT: Yeah?

17 MS. TENZER: Yeah, Your Honor. To Mr. DiNucci's point
18 about location, we would -- I think we would just like to add that,
19 one, we think it would be best to just have a single third-party
20 vendor who is handling this for a variety of reasons. There's also
21 an issue of economies of scale that will be helpful to all of us.
22 And, secondly, the vendors that we're speaking with have the
23 capability and have a presence nationwide. And so they would be
24 able to handle dealing with the various locations that are at
25 issue.

1 THE COURT: Okay.

2 All right. Well, counsel, it sounds like a lot of the
3 concerns that the defendants -- Mr. DiNucci in particular, the
4 concerns that you have raised -- can be addressed, you know, by
5 some tweaks to the stipulation.

6 And, Mr. Kolenich, I know that your clients and the other
7 defendants are certainly not agreeing to pay for this third-party
8 vendor now or in the future. The plaintiffs have agreed, you know,
9 to pay for it at this time. And, you know, if at some point the
10 payment of the cost for the third-party vendor comes up, then, you
11 know, that's just something I think we'll have to litigate. But I
12 think we'll be, you know, in a better position to evaluate each
13 party's position once -- you know, once this is done. And we'll
14 know the actual cost. And we will move forward on this discovery.

15 I think the stipulation makes a lot of sense, in looking
16 at the cases on this issue, in particular the one cited by the
17 plaintiff, but the *Pro-Cast* case I think is instructive. And, you
18 know, it doesn't -- I think why it is important to do this is that
19 this discovery has been outstanding for some time.

20 For some of the defendants there's a concern that some of
21 the -- some relevant information may have been lost one way or the
22 other. With some others -- other defendants there are concerns
23 about the inadequacy of the production. And both of those reasons
24 can certainly warrant having an order that would impose a third-
25 party vendor. So I think it -- I think it is necessary do this.

1 And I -- and it also sounds like, as long as we can do some of
2 these -- do some of these tweaks, that there isn't a great deal of
3 opposition either -- or at least that your concerns can be
4 addressed.

5 So what I would like you-all to do, Ms. Tenzer, is to
6 make some of the tweaks that we talked about here. Make the
7 stipulation reciprocal. If there's any way to clarify in the
8 stipulation that -- you know, objections that have already been
9 stated to the responsiveness or whatever else of the discovery
10 requests, that those are -- those are preserved. And I would
11 encourage you-all to try and work through those now, to the extent
12 that you can, so there is no further delay in the production of the
13 discovery.

14 MS. TENZER: Of course, Your Honor.

15 THE COURT: Let's see. And then, you know, we'll have to
16 -- we'll have to change in the -- or at least note in the protocol
17 that for the time being plaintiffs are agreeing to pay for this,
18 but that's -- you know, it is not -- it is without prejudice to any
19 request that the defendants bear the burden. And the defendants
20 certainly preserve, you know, any objections to paying for them in
21 the future. But, otherwise, I don't think that there are any other
22 issues to address in this stipulation.

23 Ms. Tenzer, is there anything else that you can identify?

24 MS. TENZER: I don't think so, Your Honor.

25 THE COURT: All right.

1 Mr. Kolenich?

2 MR. KOLENICH: Nothing further, Your Honor.

3 THE COURT: All right.

4 Mr. DiNucci?

5 MR. DiNUCCI: Nothing further, although, just for
6 clarification's sake, Your Honor didn't mention the reciprocity
7 aspect. Is that a tweak we're supposed to provide in this order as
8 well?

9 THE COURT: I'm sorry if I didn't. I thought that was
10 the first thing I said.

11 MR. DiNUCCI: Then we're fine, Your Honor. I'm sorry,
12 Your Honor. All right. We're fine.

13 THE COURT: Okay.

14 All right. Mr. Jones, anything?

15 MR. JONES: No, Your Honor.

16 THE COURT: All right.

17 All right. Why don't -- I do want to address the Discord
18 issue today too, if you-all are prepared to do that. Mr. Kolenich
19 and Mr. DiNucci, Mr. Jones, are you-all prepared to address that?

20 MR. KOLENICH: Jim Kolenich. Yes, I can address it, Your
21 Honor.

22 MR. DiNUCCI: John DiNucci. No, I'm not prepared, Your
23 Honor. I'm still reading a decision out in San Francisco and
24 looking at the law and looking -- including the act. And I have
25 got questions I have to put to my clients. I mean, I'm familiar

1 with the issue, but not sufficiently to actually make a reasoned
2 argument today, if that's what Your Honor is asking.

3 THE COURT: Okay.

4 All right. Mr. Jones?

5 MR. JONES: I'm ready. I think my -- my clients have
6 complied. And I did see Mr. Bowman's email about needing another
7 email, but I think my clients have complied.

8 THE COURT: Okay. Why don't we go ahead -- Mr. Bowman,
9 Mr. Kolenich, and Mr. Jones, why don't we go ahead and take up this
10 issue today.

11 And, Mr. DiNucci, you know, I'll certainly allow you an
12 opportunity to address this at a later time if you need some more
13 time to consider it.

14 MR. DiNUCCI: Thank you, Your Honor.

15 THE COURT: Mr. Bowman, go ahead and tell me a little bit
16 more. I have read the email about it.

17 MR. BOWMAN: Thank you, Your Honor.

18 The issue is that, as the Court may be aware, the
19 complaint alleges that the defendants conducted much of the
20 planning for the events in Charlottesville on an online platform
21 provided by a company called Discord. And some of those
22 communications have been made public and are quoted in the
23 complaint. But a complete set of those communications we believe
24 is maintained by Discord.

25 We had served requests for these materials to the

1 defendants. And we have also sent a subpoena to Discord. Discord
2 is at this point prepared to produce the responsive documents, but
3 only on the condition that the defendants provide consent. And
4 that is because the Stored Communications Act doesn't allow Discord
5 -- or they believe it doesn't allow them, and we don't dispute this
6 -- to provide individual user's communications without their
7 consent -- or to disclose them without their consent.

8 So we have asked -- Discord has provided a form of
9 consent that the defendants can use that would be acceptable to
10 enable Discord to produce these documents to the plaintiffs. We
11 have provided that to the defendants. As Mr. Jones said, his
12 clients -- or one of his clients has complied. One of his clients
13 has complied in an ineffective way. And I take it that that will
14 be addressed. And the rest of defendants have not complied; in
15 fact, have said that they would not.

16 THE COURT: Okay.

17 MR. BOWMAN: Your Honor, our position is that --

18 THE COURT: Go ahead.

19 MR. BOWMAN: I was just going to say, Your Honor, that
20 our position is that the Court has the authority and under the
21 circumstances should order the defendants to provide these
22 consents. The documents are, under the standards of the federal
23 rules, within the defendants' control, because they have the right
24 to provide consent, and therefore should be produced in this case.

25 THE COURT: Okay. Mr. Jones, what is your view on the

1 Discord?

2 MR. JONES: Do you mean me, Your Honor?

3 THE COURT: Yes, sir.

4 MR. JONES: Or did you mean Mr. Kolenich?

5 THE COURT: No. I want to start in reverse order.

6 MR. JONES: Oh. My clients are happy to provide the
7 consent. They have already. And I'll fix the issue that
8 Mr. Bowman emailed me about earlier today.

9 THE COURT: Okay.

10 All right. Mr. Kolenich.

11 MR. KOLENICH: Thank you, Your Honor.

12 We did discuss this with the attorneys from Cooley last
13 week and explained the reasons why my clients wouldn't comply and
14 were in need of -- you know, we're aware that the Court can order
15 this. We're aware that this is discoverable. And I don't have any
16 argument that I'm aware of that can be posited to prevent the Court
17 from issuing that order. But for reasons that, you know, we
18 discussed among counsel, we need that court order, and specifically
19 because of that Stored Communications Act. The participants in the
20 Discord chats believed these were private, that they had privacy.
21 Their ignorance of the Court's ability to order us to sign is
22 notwithstanding, but we can't just voluntarily sign these releases
23 in the absence of a court order.

24 If the Court is going to issue that order at the request
25 of the plaintiffs -- and we don't have a problem with the Court

1 accepting an oral motion from them today -- we're not going to
2 object. We will comply. But we need that court order.

3 THE COURT: Okay. All right.

4 Well, I certainly think it is appropriate to do the
5 order. I mean, these -- from the allegations and what you-all
6 said, these -- there are potentially relevant discussions on
7 Discord. And, really, it is -- I think it would be incumbent upon
8 the defendants to provide those discussions. So, you know, this is
9 the way to do it, to require the consent of Discord --

10 MR. KOLENICH: Yeah, we can't -- we can't provide them
11 because Discord disabled all of the account credentials from my
12 client. That's why we haven't been able to provide them. So
13 Discord has to do it. And, you know, the Court order allows us to
14 sign the documents that the plaintiffs' attorneys got from Discord.

15 I haven't been able to get anything from Discord. You
16 know, I wrote them on behalf of my clients. Nothing. No response
17 whatsoever.

18 THE COURT: Okay. All right.

19 Well, I will enter the order, then, for -- Mr. Jones and
20 Mr. Kolenich, for your clients, requiring that they sign the
21 consent form that Discord has provided.

22 And, Mr. DiNucci, why don't -- why don't we do this? How
23 about you take a bit of time and then let -- why don't you let the
24 Court know. And you can just file a notice, and just file it on
25 ECF. It can be real short, just saying that you are either

1 opposing the Court entering an order requiring that your client
2 sign the consent form or that you are not opposing it. And if you
3 are opposing it, then we can do a conference call and address the
4 reasons for that. And I'll be happy to hear what you have to say
5 at that point. But why don't you do that within -- file that
6 notice within seven days?

7 MR. DiNUCCI: Fine, Your Honor.

8 THE COURT: All right.

9 MR. KOLENICH: Your Honor, this is Jim Kolenich.

10 I just -- one other observation. If the Court order
11 could order the plaintiffs to turn over whatever they get from
12 Discord to us when they have it, because the release doesn't
13 address that issue, I would appreciate it.

14 THE COURT: Okay. Yeah, I think they would be obligated
15 to do that.

16 Okay. From the plaintiffs' perspective, is there
17 anything else that we need to address today?

18 MS. KAPLAN: Your Honor, I don't think that there's
19 anything that needs to be addressed substantively. There's a
20 couple of things coming down the pike, for lack of a better term,
21 here.

22 There's an issue about an email that I received from
23 Mr. Kessler under a different name that may be the subject of a
24 sanctions motion. And then there's a withdrawal motion which we're
25 currently considering whether or not to oppose, researching the

1 case law. And we'll get back to the Court promptly on that.

2 THE COURT: Okay.

3 Mr. Kolenich, on the --

4 MS. TENZER: Your Honor.

5 THE COURT: Hold on just a second, Ms. Tenzer.

6 Mr. Kolenich, on the motion to withdraw, you know, one
7 thing that if I were to grant that that we would need so that the
8 Court can communicate with those clients and also so the plaintiffs
9 could communicate with a pro se party is that, you know, I wouldn't
10 be able to let you-all out of the case until you provide the
11 contact information for those defendants.

12 MR. KOLENICH: I can provide that today, Your Honor.

13 THE COURT: Okay. Well, we don't need it today, but --

14 MS. TENZER: Your Honor --

15 THE COURT: Yes, and -- Ms. Tenzer, go ahead.

16 MS. TENZER: On that -- on that point, we don't have that
17 information for Mr. Mosely, who counsel has withdrawn their
18 representation for Mr. Mosely and that information hasn't been
19 provided. And, you know, we have been continuing to try to
20 essentially serve Mr. Mosely through his former counsel. But at
21 some point it would probably be a good idea to have that contact
22 information.

23 THE COURT: Yeah. I did notice that in one of the -- I
24 think a footnote in one of your filings. And the Court doesn't
25 have anything on ECF for him.

1 So, Mr. Kolenich -- and I think that that was something
2 that I had put in the order, you know, that you were to provide the
3 Court with his contact information.

4 MR. KOLENICH: I missed that in the order if you did,
5 Your Honor, but that's no problem. I'll provide that with the
6 other two when I send it.

7 THE COURT: Okay.

8 MR. KOLENICH: I should observe, as to Mr. Mosely, we
9 don't have anything but an email. We don't have a good phone
10 number nor an address.

11 THE COURT: Okay. All right. Well, if that's all you
12 have, that -- that's what you have. So we'll look for that. And
13 you can just send that in to the clerk's office and also provide to
14 plaintiffs' counsel.

15 MR. KOLENICH: Yes, sir.

16 THE COURT: All right.

17 All right. Mr. Kolenich, is there anything else to raise
18 today?

19 MR. KOLENICH: No. I know they have mentioned this
20 Kessler email. You know, non attorneys aren't aware of the ethical
21 rules governing lawsuits or, you know, attorney contact, so -- he
22 has been instructed and admonished and he agrees not to do that
23 anymore.

24 I also have account credentials for that email. And
25 there's literally -- you know, it was -- it was opened well after

1 the incident. There's literally nothing in there about
2 Charlottesville except that one email that he sent to plaintiffs'
3 counsel. So I wanted to put that of record. There's really
4 nothing there other than the improper communication. There's no
5 substance behind that or damages behind that.

6 THE COURT: Okay.

7 All right. Mr. DiNucci, anything else?

8 MR. DiNUCCI: None, Your Honor.

9 THE COURT: All right. And, Mr. Jones, anything else?

10 MR. JONES: No, Your Honor.

11 THE COURT: All right. And, Mr. Campbell?

12 MR. CAMPBELL: No, sir.

13 THE COURT: Okay. All right. Well, counsel, thanks for
14 calling in today. I will try and get this order out either -- if
15 not today, then certainly early next week. And in the meantime, if
16 you-all want to work on that stipulation, making the revisions that
17 we have talked about, I'll get that entered shortly after I receive
18 the draft of it.

19 UNIDENTIFIED VOICE: Thank you, Your Honor.

20 THE COURT: All right. Well, thank you-all. Have a good
21 weekend.

22 (Thereupon, these proceedings were adjourned at 3:29 p.m.)
23
24
25

1 I, court-approved transcriber, certify that the foregoing is a
2 correct transcript from the official electronic sound recording of
3 the proceedings in the above-entitled matter.
4

5 _____/s/ Carol Jacobs White _____ November 20, 2018
6 Signature of Approved Transcriber Date
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